14-462

Supreme Court, U.S.
FILED
OCT 21 2014
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second District

PETITION FOR WRIT OF CERTIORARI

MELISSA D. INGALLS
ROBYN E. BLADOW
SHAUN PAISLEY
KIRKLAND & ELLIS LLP
333 S. Hope St.
Los Angeles, CA 90071
(213) 680-8400

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

October 21, 2014

QUESTION PRESENTED

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner DIRECTV, Inc. has been merged into DIRECTV, LLC, with DIRECTV, LLC as the surviving entity. Pursuant to Supreme Court Rule 29.6, DIRECTV, LLC makes the following disclosures concerning parent entities and publicly held corporations that own 10% or more of its stock:

DIRECTV Holdings, LLC is the direct parent company and 100% owner of DIRECTV. LLC;

The DIRECTV Group, Inc. is the direct parent company and 100% owner of DIRECTV Holdings, LLC;

Greenlady Corp. controls a 57% interest in The DIRECTV Group, Inc.;

DTV Entertainment, Inc. is the direct parent company and 100% owner of Greenlady Corp.; and

DIRECTV, a publicly traded company and the ultimate parent company of DIRECTV, LLC, is the direct parent company and 100% owner of DTV Entertainment, Inc., and controls a 43% interest in The DIRECTV Group, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT ii

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

PERTINENT STATUTES AND RULES 4

STATEMENT OF THE CASE 5

A. Background 5

B. Proceedings Below 6

REASON FOR GRANTING THE WRIT 9

The California Court of Appeal Erred, And Created A Conflict With The Ninth Circuit, By Applying Preempted State Law To Invalidate An FAA-Governed Arbitration Agreement. 9

CONCLUSION 17

APPENDIX CONTENTS

Order of the California Supreme Court, July 23, 2014 ..... 1a

Opinion of the California Court of Appeal, April 7, 2014 ..... 2a

Opinion of the California Superior Court, County of Los Angeles, January 26, 2012 ..... 17a

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....13

American Express Co. v. Italian Colors Restaurant,
133 S. Ct. 2304 (2013) 12, 17

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 1-3, 7-8, 10-13, 15-16

Auto Equity Sales, Inc. v. Superior Ct.,
369 P.2d 937 (Cal. 1962).....9

Brown v. Investors Mortg. Co.,
121 F.3d 472 (9th Cir. 1997) (*per curiam*) 11

Brown v. Ralphs Grocery Co.,
128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011) 7

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....13

Cohen v. DIRECTV, Inc.,
48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006) 7

Discover Bank v. Superior Ct.,
113 P.3d 1100 (Cal. 2005).... 1-2, 7-8, 10-11, 13, 15-16

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996).....13

Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.,
661 F.2d 479 (5th Cir. 1981) 11

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,
458 U.S. 141 (1982).....11

Granite Rock Co. v. International Bhd. of Teamsters,
130 S. Ct. 2847 (2010) 13

Hauenstein v. Lynham,
100 U.S. 483 (1880).....11

In re DIRECTV Early Cancellation Fee Mktg. & Sales Pracs. Litig.,
810 F. Supp. 2d 1060 (C.D. Cal. 2011),
rev'd on other grounds sub nom. Lombardi v. DirecTV, Inc.,
546 F. App'x 715 (9th Cir. 2013) 13

In re H&R Block Refund Anticipation Loan Litig.,
__ F. Supp. 2d __, 2014 WL 3672124
(N.D. Ill. July 23, 2014) 14, 15, 16

In re Olshan Found. Repair Co.,
328 S.W.3d 883 (Tex. 2010).....12

KPMG LLP v. Cocchi,
132 S. Ct. 23 (2011) (*per curiam*) 13

Lafferty v. Wells Fargo Bank,
153 Cal. Rptr. 3d 240 (Cal. Ct. App. 2013).....9

Marmet Health Care Center, Inc. v. Brown,
132 S. Ct. 1201 (2012) (*per curiam*) 13

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 13

Meyer v. T-Mobile USA Inc.,
836 F. Supp. 2d 994 (N.D. Cal. 2011) 15

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....13, 14

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 14

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 2, 8-13, 16

Mutual Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 11, 12

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*) 17

Ostrowiecki v. Aggressor Fleet, Ltd.,
965 So.2d 527 (La. Ct. App. 2007) 12

Preston v. Ferrer,
552 U.S. 346 (2008) 13

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 17

Sarti v. Salt Creek Ltd.,
85 Cal. Rptr. 3d 506 (Cal. Ct. App. 2008) 9

Southland Corp. v. Keating,
465 U.S. 1 (1984) 10, 13, 17

Vaden v. Discover Bank,
556 U.S. 49 (2009) 17

Yee v. City of Escondido,
503 U.S. 519 (1992) 10

Statutes and Rules

28 U.S.C. § 1257(a) 4

9 U.S.C. § 2 ..... 4, 17

9 U.S.C. § 4 ..... 5, 14

U.S. Const. art. VI, cl. 2 ..... 4, 10

Other Authorities

Corbin, Arthur L.,
Corbin on Contracts (1962) 12

MovieTickets.com® Privacy Statement,
available at
http://www.movietickets.com/privacy.asp#.U3ZdB50pDMo
(last accessed Oct. 20, 2014).....16

Time Warner Cable, Residential Services Subscriber Agreement,
at http://help.twcable.com/RSSA_English.pdf
(last accessed Oct. 20, 2014).....16

T-Mobile Terms & Conditions,
available at http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions
(last accessed Oct. 20, 2014).....15

INTRODUCTION

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that California's *Discover Bank* rule, which conditioned the enforceability of consumer arbitration agreements on the availability of classwide arbitration, was preempted by the Federal Arbitration Act ("FAA"). As the Court explained, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Because class arbitration "is not arbitration as envisioned by the FAA [and] lacks its benefits," it "may not be required by state law." *Id.* at 1752-53.

The California Court of Appeal's decision in this case does precisely what *Concepcion* prohibits: it applies state law to invalidate an arbitration agreement solely because that agreement includes a class-action waiver. The Court of Appeal purported to reconcile that result with *Concepcion* by holding that the parties here contractually opted out of FAA preemption, even though they specified that their arbitration agreement "shall be governed by the Federal Arbitration Act." Ironically, the Court based that holding on a "non-severability" clause designed to *prevent* class arbitration. Under that clause, the parties agreed that the arbitration agreement as a whole would be unenforceable if "the law of [the customer's] state" would find the class-action waiver unenforceable. The Court of Appeal seized on that clause to declare that the parties intended to rely on state law *preempted* by the FAA to avoid enforcement of an arbitration agreement *governed* by the FAA.

That reasoning, as the Ninth Circuit explained in interpreting the *same* language in the *same* arbitration agreement, is "nonsensical." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013). Under the Supremacy Clause, there is no such thing as state law immune from the preemptive force of federal law; to the extent that state law is preempted by federal law, it is a nullity. Thus, *Concepcion* made clear that "the *Discover Bank* rule [disallowing class-action waivers] is not, and indeed never was, California law." *Id.* Accordingly, the FAA requires enforcement of this arbitration provision.

The California Court of Appeal made no attempt to distinguish the Ninth Circuit's decision in *Murphy*; rather, it simply dismissed that decision as "unpersuasive." The upshot is the intolerable situation that parties in California can enforce their federal arbitration rights in federal court, but not in the state court across the street. And because the Court of Appeal's decision is binding on every state trial court in California, and "non-severability" clauses of the type at issue here are found in millions of individual consumer arbitration agreements in that State and elsewhere, the scope of the problem is truly monumental. This Court's review is warranted to resolve this manifest and acknowledged split of authority on a matter of federal law.

And, at an even more fundamental level, review is warranted to vindicate the supremacy of federal law and this Court's interpretation thereof. The FAA, as this Court has stated time and again, establishes a substantive federal policy in favor of arbitration, which requires both federal and state courts to enforce arbitration agreements according to their

terms and to resolve any doubts in *favor* of arbitration. The California Court of Appeal made a mockery of that federal policy, and this Court's recent decision in *Concepcion*, by refusing to enforce federal arbitration rights here on a theory that the Ninth Circuit has described as "nonsensical." The state court below transformed an agreement that *forbids* class arbitration into an agreement that *requires* class arbitration to be enforceable. By no stretch of the imagination can that decision be characterized as resolving any doubts in favor of arbitration; rather, that decision can only be described as a brazen attempt to defy *Concepcion* by resurrecting the preempted *Discover Bank* rule. Because the decision below not only creates an acknowledged conflict between state and federal courts on a matter of federal law, but also evinces the very hostility to arbitration that led to the enactment of the FAA in the first place, this Court's review is warranted.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 170 Cal. Rptr. 3d 190, and reprinted in the Appendix ("App.") at 2-16a. The unreported order of the California Supreme Court denying review of the Court of Appeal's decision is reprinted at App. 1a. The trial court's unreported opinion denying petitioner's motion to compel arbitration is reprinted at App. 17-20a.

JURISDICTION

The Court of Appeal issued its decision on April 7, 2014. App. 2a. Petitioner filed a timely petition for review, which the California Supreme Court denied

on July 23, 2014. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT STATUTES AND RULES

The Supremacy Clause of the U.S. Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 2 of the FAA provides in relevant part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any ... court ... for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the

> making of the agreement for arbitration ... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

STATEMENT OF THE CASE

A. Background

The provision and acceptance of DIRECTV programming services—like many other consumer services (*e.g.*, banking, cellular, internet)—are subject to certain basic terms and conditions. Those terms and conditions are set forth in the DIRECTV Customer Agreement. The Customer Agreement at issue here includes a dispute-resolution provision (Section 9) that specifies in relevant part:

> [I]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated ... and under the Rules set forth in this Agreement.
>
> * * *
>
> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration.

> If, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable.

In addition, the Customer Agreement contains a choice of law provision (Section 10(c)) that specifies as follows:

> Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

Finally, as relevant here, the Customer Agreement contains a general severability provision (Section 10(d)): "If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable."

B. Proceedings Below

In September 2008, respondents Amy Imburgia and Kathy Greiner filed separate putative class actions against DIRECTV, which were later consolidated, in Los Angeles Superior Court. App. 3a. Both complaints alleged that DIRECTV had violated a variety of California laws by assessing early cancellation fees when respondents cancelled

their DIRECTV accounts before the end of an agreed-upon time period. *Id.*

Although the parties had agreed to arbitrate disputes like this one, DIRECTV did not move to compel arbitration when the complaints were filed. That is because, in 2005, the California Supreme Court had announced a rule that invalidated almost all consumer arbitration agreements containing class-action waivers under California law. *See Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1106-10 (Cal. 2005). Applying the *Discover Bank* rule, California courts refused to enforce the arbitration provision in the DIRECTV Customer Agreement. *See, e.g., Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006). Accordingly, any attempt to compel arbitration when the complaints in this case were filed would have been futile under then-prevailing California law. The case therefore proceeded in court until, on April 27, 2011, this Court held in *Concepcion* that the FAA preempts the *Discover Bank* rule. *See* 131 S. Ct. at 1747-48.

In light of *Concepcion*, DIRECTV promptly moved to compel arbitration. The Superior Court (Wiley, J.), however, denied the motion on the ground that the parties' arbitration agreement is unenforceable under *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), a case involving labor-related representative actions under California's Private Attorney General Act of 2004. App. 17-20a.

DIRECTV appealed, but the Court of Appeal affirmed the trial court's decision on different grounds. *See* App. 2-16a. In particular, the Court of Appeal focused on the arbitration agreement's non-severability provision, which states that "if 'the law

of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.'" App. 6a (quoting Customer Agreement § 9). According to the Court, the reference to "the law of your state" in this provision means state law immune from the preemptive force of federal law. App. 6-15a. Thus, the Court concluded, the non-severability clause requires the application of the *Discover Bank* rule to nullify the parties' arbitration provision, even though that rule is concededly inconsistent with, and thus preempted by, the FAA under *Concepcion*, and even though the arbitration agreement here is concededly governed by the FAA. App. 15a.

The Court of Appeal acknowledged that its decision conflicts with the Ninth Circuit's decision in *Murphy*, which had characterized the reasoning adopted by the Court of Appeal as "nonsensical." *Murphy*, 724 F.3d at 1226. The Court of Appeal, in turn, dismissed the Ninth Circuit's analysis as "unpersuasive." App. 13a. According to the Court of Appeal, "*Murphy* provides no basis for concluding that the parties intended to use the phrase 'the law of your state'" to mean state law subject to the preemptive force of federal law. *Id.* Instead, the Court of Appeal interpreted the phrase "the law of your state" to mean "'the (nonfederal) law of your state *without considering the preemptive effect, if any, of the FAA.*'" *Id.* at 14a (emphasis added). Applying the preempted *Discover Bank* rule, the Court held the class-action waiver invalid, and thus refused to enforce the entire arbitration agreement. App. 15a.

DIRECTV timely petitioned for review in the California Supreme Court to resolve the conflict between the California Court of Appeal and the Ninth Circuit on this question of federal law. On July 23, 2014, however, the California Supreme Court denied review over Justice Baxter's dissent. App. 1a. This petition follows.

REASON FOR GRANTING THE WRIT

The California Court of Appeal Erred, And Created A Conflict With The Ninth Circuit, By Applying Preempted State Law To Invalidate An FAA-Governed Arbitration Agreement.

This petition presents a conflict about as stark as they come: the California Court of Appeal and the Ninth Circuit interpreted the *same* language in the *same* FAA-governed arbitration agreement, and came to diametrically opposite results. The Ninth Circuit in *Murphy* characterized the position adopted by the California Court of Appeal as "nonsensical," 724 F.3d at 1226, while the Court of Appeal dismissed the Ninth Circuit's position as "unpersuasive," App. 13a. The Ninth Circuit thus enforced the arbitration provision at issue, while the Court of Appeal refused to do so. Under settled California law, the Court of Appeal's decision in this case is binding on *every* trial court in that State. *See Auto Equity Sales, Inc. v. Superior Ct.*, 369 P.2d 937, 940 (Cal. 1962) ("Decisions of every division of the District Courts of Appeal are binding upon all the ... superior courts of this state."); *see also Lafferty v. Wells Fargo Bank*, 153 Cal. Rptr. 3d 240, 257 (Cal. Ct. App. 2013) (same); *Sarti v. Salt Creek Ltd.*, 85 Cal. Rptr. 3d 506, 510 (Cal. Ct. App. 2008) (same).

Thus, the enforcement of federally protected arbitration rights in California now turns on whether a dispute is litigated in state or federal court. This Court should not tolerate this anomalous and untenable situation, which "encourage[s] and reward[s] forum-shopping" antithetical to the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). These forum-shopping concerns present "a substantial reason for granting certiorari," particularly where, as here, "the conflict is between two courts whose jurisdiction includes California, the State with the largest population ...." *Yee v. City of Escondido*, 503 U.S. 519, 537-38 (1992).

If the conflict goes unresolved, California trial courts will be required to continue applying a rule that is fundamentally inconsistent with, and thus preempted by, the FAA. *See Concepcion*, 131 S. Ct. at 1748. According to the Court of Appeal, the non-severability provision in DIRECTV's Customer Agreement, which sought to *avoid* class arbitration under the *Discover Bank* rule, evinces an intent to *preserve* the *Discover Bank* rule. In particular, the Court held, the agreement's reference to "the law of your state" means *hypothetical* state law immune from the preemptive force of federal law, rather than *actual* state law subject to the preemptive force of federal law. App. 8-15a. That conclusion cannot withstand scrutiny for at least three reasons.

First, as the Ninth Circuit explained in *Murphy*, there is no such thing as state law immune from the preemptive force of federal law. *See* 724 F.3d at 1226. Under the Supremacy Clause of the Federal Constitution, U.S. Const. art. VI, cl. 2, state law is always subject to the preemptive force of federal law,

and, to the extent preempted, is "nullified," *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). The preempted state law does not live on in the shadows, only to emerge when unsuspecting parties invoke the "law of [a] state" in their private dealings. Rather, "it has long been settled that state laws that conflict with federal law are *without effect*." *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (emphasis added; internal quotation omitted).

Thus, in light of *Concepcion*, "the *Discover Bank* rule is not, and indeed never was, California law." *Murphy*, 724 F.3d at 1226. Rather, "the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, *is* the law of California and of every other state." *Id.* (emphasis in original); *see also id.* (""[A] fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'") (quoting *De la Cuesta*, 458 U.S. at 157) (in turn quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)); *see also Brown v. Investors Mortg. Co.*, 121 F.3d 472, 476 (9th Cir. 1997) (*per curiam*) (reference to state law in contract "does not mean the parties decided that federal law should not apply"); *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 482-83 (5th Cir. 1981) (reference to state law in contract does "not mean that all rights and obligations created by [federal law] are superseded by [state] law" because "[a] choice of law provision ... merely designates the state whose law is to be applied to the extent its use is not preempted by nor contrary to the policies of [federal law]"); *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 890 (Tex.

2010) ("[J]ust as the FAA is part of the substantive law of Texas, the FAA would be part of the arbitration laws in Texas," and thus "[t]he language of the arbitration clause designating arbitration pursuant to 'the arbitration laws in your state' includes the FAA"); *Ostrowiecki v. Aggressor Fleet, Ltd.*, 965 So.2d 527, 536 (La. Ct. App. 2007) (reference to state law in contract does not avoid federal preemption because "it is axiomatic that the law of any state includes federal law"); *see also* 6A Arthur L. Corbin, *Corbin on Contracts* § 1374 at 7 (1962) ("Under our Constitution, national law is also the law of every separate State."). It is thus fanciful to interpret a reference to "the law of your state" to mean state law that is "without effect," *Bartlett*, 133 S. Ct. at 2473—which, after all, is not "law" at all.

Second, the agreement at issue here *specifically provides* that, "[n]otwithstanding" the general choice-of-law provision in the Customer Agreement, the arbitration clause "'shall be governed by the Federal Arbitration Act.'" App. 5a (quoting Customer Agreement § 10(b)). Given the parties' explicit expectation that the FAA would govern their arbitration agreement, "it would be remarkable for a court to erase that expectation" by relying on state law inconsistent with, and thus preempted by, the FAA. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013). As the Ninth Circuit recognized in *Murphy*, the non-severability provision represents an agreement to *prevent* the application of state law inconsistent with the FAA, "not an agreement to *rely* on state law that 'creates a scheme inconsistent with the FAA.'" 724 F.3d at 1226 (emphasis added; quoting *Concepcion*, 131 S. Ct. at 1748); *see also In re DIRECTV Early*

Cancellation Fee Mktg. & Sales Pracs. Litig., 810 F. Supp. 2d 1060, 1071 (C.D. Cal. 2011) (holding that to apply preempted state law to the DIRECTV arbitration agreement would render the FAA choice-of-law provision "meaningless" and that "the language of the Arbitration Clause is clear that the parties intended for federal law to apply"), *rev'd on other grounds sub nom. Lombardi v. DirecTV, Inc.*, 546 F. App'x 715 (9th Cir. 2013). Far from embracing the *Discover Bank* rule, the parties here "did exactly the opposite" by agreeing to a class-action waiver. *Murphy*, 724 F.3d at 1228. Because the parties' arbitration agreement is, by its express terms, "governed by the Federal Arbitration Act," the California Court of Appeal's refusal to enforce that agreement based on state law preempted by the FAA can only be described as perverse.

And *third*, even if there were any doubts as to any of the foregoing, the decision below cannot possibly be characterized as a faithful application of the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (*per curiam*); *Concepcion*, 131 S. Ct. at 1749; *Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2856-57 (2010); *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-45 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Southland*, 465 U.S. at 10-16;

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Under that policy, as a matter of substantive federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mitsubishi*, 473 U.S. at 626 (noting that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability").

By refusing to compel arbitration "in accordance with the terms of the agreement," 9 U.S.C. § 4, the California Court of Appeal plainly violated the FAA. Indeed, although the arbitration agreement at issue here specifies that it is "governed by the Federal Arbitration Act," the Court did not even acknowledge the "emphatic federal policy" in favor of arbitration. *Mitsubishi Motors*, 473 U.S. at 631; *see also In re H&R Block Refund Anticipation Loan Litig.*, __ F. Supp. 2d __, 2014 WL 3672124, at *5 (N.D. Ill. July 23, 2014) (rejecting the decision below and noting that "the *Imburgia* court failed to take account of the liberal federal policy favoring arbitration").

And the conflict between the California Court of Appeal and the Ninth Circuit affects a wide range of arbitration agreements entered into by millions of individual customers and companies in California and elsewhere. Many arbitration agreements, like the one at issue here, include references to state law. If such references are deemed to refer to state law preempted by the FAA, then the FAA's preemptive

effect is essentially nullified. Thus, customers of T-Mobile USA sought to avoid arbitration by making the same argument as respondents here: that the preempted *Discover Bank* rule continues to apply after *Concepcion* because "T-Mobile voluntarily and privately agreed to limit the application of the Agreement's terms, including the arbitration clause, if any of the terms were invalid under the law of a particular jurisdiction." *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1001 (N.D. Cal. 2011) (Breyer, J.); *see generally* T-Mobile Terms & Conditions, *available at* http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions (last accessed Oct. 20, 2014) (T-Mobile arbitration agreement specifying that "[i]f any provision of the Agreement is invalid under the law of a particular jurisdiction, that provision will not apply in that jurisdiction" and including class-action waiver and non-severability provision). The court, however, squarely rejected that argument, noting that (as here) "the arbitration agreement is not governed *only* by California law," but also by the FAA, and "the FAA preempts the *Discover Bank* rule" per *Concepcion*. *Meyer*, 836 F. Supp. 2d at 1001 (emphasis in original).

Similarly, customers of H&R Block sought to avoid arbitration after *Concepcion* by "argu[ing] that the arbitration clause does not apply to their claims because they reside in states that prohibit class-action waivers in consumer arbitration agreements." *H&R Block*, 2014 WL 3672124, at *3; *see generally id.* at *2 (H&R Block loan agreement providing that "IF YOU APPLY FOR [a loan] IN A STATE THAT PROHIBITS ARBITRATION OR CLASS ACTION WAIVERS FOR CLAIMS RELATED TO [such a

loan] ... THIS [arbitration agreement] SHALL NOT APPLY TO THOSE CLAIMS."). Again, the court readily rejected that argument, relying on the Ninth Circuit's decision in *Murphy* and rejecting the California Court of Appeal's decision in this case. *See id.* at *3-5.

And these references to state law in arbitration agreements are hardly idiosyncratic. *See, e.g.*, MovieTickets.com® Privacy Statement, *available at* http://www.movietickets.com/privacy.asp#.U3ZdB50pDMo (last accessed Oct. 20, 2014) (agreeing to arbitrate disputes on an individual basis only, but providing that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire paragraph (Class Action Waiver) is unenforceable"); Time Warner Cable, Residential Services Subscriber Agreement, *available at* http://help.twcable.com/RSSA_English.pdf (last accessed Oct. 20, 2014) (agreement specifying that if a "legal requirement[] that appl[ies] where you live or where we provide Services to you ... conflicts with our Customer Agreements with respect to one or more Services, the legal requirement will take priority over the part of our Customer Agreements with which it conflicts," and containing arbitration provision with class-action waiver and non-severability provision).

At bottom, the California Court of Appeal flouted federal law by refusing to enforce the FAA-governed arbitration agreement in this case and resurrecting the *Discover Bank* rule buried in *Concepcion*. This Court should not countenance such insubordination. As this Court has explained, "[t]he 'body of federal

substantive law' generated by elaboration of FAA § 2 is equally binding on state and federal courts." *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (quoting *Southland*, 465 U.S. at 12). Indeed, "[g]iven the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Id.*; *see also Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (*per curiam*). Because the California state courts have abdicated that role, enforcement of federal arbitration rights in that State now depends on whether a dispute is litigated in state or federal court.

Allowing the acknowledged conflict between the California Court of Appeal and the Ninth Circuit to fester would not only promote legal uncertainty and forum-shopping, but would undermine the whole purpose of arbitration in the first place: to promote speedy and efficient resolution of disputes. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2312; *Southland*, 465 U.S. at 7. An arbitration agreement is effectively worthless if it will be enforced in some courts but not in others. Accordingly, this Court should grant this petition to vindicate the FAA's "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

MELISSA D. INGALLS
ROBYN E. BLADOW
SHAUN PAISLEY
KIRKLAND & ELLIS LLP
333 S. Hope St.
Los Angeles, CA 90071
(213) 680-8400

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

APPENDIX

APPENDIX CONTENTS

Order of the California Supreme Court,
July 23, 2014 ..... 1a

Opinion of the California Court of Appeal,
April 7, 2014 ..... 2a

Opinion of the California Superior Court,
County of Los Angeles,
January 26, 2012 ..... 17a

Court of Appeal, Second Appellate District,
Division One - No. B239361

S218686

IN THE SUPREME COURT OF CALIFORNIA

En Banc

AMY IMBURGIA et al.,

Plaintiffs and Respondents,

v.

DIRECTV, INC.,

Defendant and Appellant.

The application to appear as counsel pro hac vice is granted. The petition for review is denied.

Baxter, J., is of the opinion the petition should be granted.

CANTIL-SAKAUYE
Chief Justice

SUPREME COURT
FILED
JUL 23 2014
Frank A. McGuire Clerk
Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

AMY IMBURGIA et al.,

Plaintiffs and Respondents,

v.

DIRECTV, INC.,

Defendant and Appellant.

B239361

(Los Angeles County Super. Ct. No. BC398295)
Court of Appeal - Second Dist.

FILED
APR 7 2014
Joseph A. Lane Clerk

APPEAL from an order of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.

Kirkland & Ellis LLP, Melissa D. Ingalls, Robyn E. Bladow, and Shaun Paisley for Defendant and Appellant.

Milstein Adelman LLP, Paul D. Stevens, Mayo L. Makarczyk, and Shireen Mohsenzadegan; Consumer Watchdog, Harvey Rosenfield, and Pamela Pressley; The Evans Law Firm and Ingrid Maria Evans; Law Offices of F. Edie Mermelstein and F Edie Mermelstein for Plaintiffs and Respondents.

DIRECTV, Inc. moved to dismiss or stay this class action litigation and to compel arbitration. The superior court denied the motion. DIRECTV argues that the motion should have been granted under the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740] *(Concepcion)*. We conclude that under the terms of the parties' arbitration agreement, the motion was correctly denied. We therefore affirm.

BACKGROUND

On September 17, 2008, Amy Imburgia filed a class action complaint against DIRECTV. alleging claims for unjust enrichment, declaratory relief, false advertising, and violation of the Consumer Legal Remedies Act (CLRA) (Civ. Code,. § 1750 et seq.), the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and Civil Code section 1671, subdivision (d). Imburgia's claims were based on allegations that DIRECTV has improperly charged early termination fees to its customers. Kathy Greiner filed a similar class action complaint one day after Imburgia, and Imburgia and Greiner (hereafter plaintiffs) jointly filed a first amended complaint on March 16, 2009. Plaintiffs' lawsuit proceeded at the same time as a multidistrict litigation proceeding in federal court involving similar claims. DIRECTV moved to stay plaintiffs' state court action pending the outcome of the multidistrict litigation, but the superior court denied the motion.

Plaintiffs subsequently moved for class certification. On April 20, 2011, the superior court granted the motion in part and denied it in part,

certifying a class as to one of plaintiffs' theories but denying certification as to others.

On April 27, 2011, the United States Supreme Court decided *Concepcion,* which held that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) preempts the rule of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 *(Discover Bank). Discover Bank* held that under certain circumstances, class action waivers in consumer contracts are unconscionable and hence unenforceable. *(Id.* at pp. 162-163.)

On May 17, 2011, less than one month after the Court decided *Concepcion,* DIRECTV moved to stay or dismiss plaintiffs' action, decertify the class, and compel arbitration of plaintiffs' claims. DIRECTV explained that it had not moved to compel arbitration earlier because, in an unrelated case several years before plaintiffs filed this litigation, the Court of Appeal had held that the arbitration provision in DIRECTV's customer agreement was unenforceable under *Discover Bank.* (See *Cohen* v. *DIRECTV, Inc.* (2006) 142 Cal.App.4th 1442, 1455.) Until *Concepcion* held that the FAA preempts the rule of *Discover Bank,* DIRECTV consequently believed that a motion to compel arbitration would be futile.

The relevant arbitration provision is contained in section 9 of DIRECTV's 2007 customer agreement. Section 9 provides that "any legal or equitable claim relating to this Agreement, any addendum, or your Service" will first be addressed through an informal process and, if the claim is not resolved informally, then "any Claim either of us asserts will be resolved only by binding arbitration" under JAMS rules.

Under the heading "Special Rules," section 9 of the agreement provides as follows: "Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable."

Section 10 of the 2007 customer agreement contains provisions addressing several miscellaneous matters, including the following provision concerning "Applicable Law": "The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act."

Plaintiffs opposed the motion to compel arbitration on numerous grounds. The superior court denied the motion, and DIRECTV timely appealed.

STANDARD OF REVIEW

"On appeal from the denial of a motion to compel arbitration, 'we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law. [Citations.]' (*Kleveland v. Chicago Title Ins. Co.*

(2006) 141 Cal.App,4th 761, 764.)" (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892.) We review the superior court's ruling, not its reasoning, and we consequently may affirm on the basis of any valid legal theory, regardless of whether the superior court relied on it. (See, e.g., *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 663-664.)

DISCUSSION

In addition to stating that the parties waive their rights to bring class claims, section 9 of the 2007 customer agreement states that if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." Plaintiffs argue that the law of California would find the class action waiver unenforceable because, for example, the CLRA expressly precludes waiver of the right to bring a class action under the CLRA. (Civ. Code, §§ 1751, 1781, subd. (a).) Plaintiffs conclude that the parties' entire arbitration agreement is unenforceable, pursuant to the agreement's express terms, because the law of plaintiffs' state would find the class action waiver unenforceable. We agree.

As all parties point out, the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 478 (*Volt*).) The FAA's broad policy of enforcement of arbitration agreements according to their terms applies even to "agreements to arbitrate under different rules than those set forth in the [FAA] itself." (*Id.* at p. 479.) Thus, if "parties have agreed to abide by state rules

of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA," even if application of the state rules would yield a different result from application of the FAA. (*Ibid.*; see also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1352-1353 (*Cable Connection*); *Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 Cal.App.4th 1320, 1326 ["even if the FAA applies because the [contract] affects interstate commerce ... the parties may agree that California law governs their agreement to arbitrate"].) Consequently, although it is impossible for parties to "'opt out' of FAA coverage in its entirety because it is the FAA itself that authorizes parties to choose different rules in the first place," it is in other respects permissible for the parties to "opt out of the FAA's default rules." (*Ario v. The Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account* (3d Cir. 2010) 618 F.3d 277, 288 (*Ario*).) In particular, a choice of law provision in an arbitration agreement is, in general, enforceable to the same extent as a choice of law provision in any other contract. (See generally *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464-466 [articulating the standard for enforcement of contractual choice of law provisions under California law].) We have previously held that the parties to a contract may choose the law under which the enforceability of a class action waiver is to be determined. (*Discover Bank v. Superior Court* (2005) 134 Cal.App.4th 886, 889.)

Under the foregoing principles, if section 9 of DIRECTV's 2007 customer agreement had said that the enforceability of the class action waiver "shall be determined under the law of your state to the extent

that it is not preempted by the FAA," then that provision would have been enforceable. Likewise, if section 9 had said that the enforceability of the class action waiver "shall be determined under the law of your state without considering the preemptive effect, if any, of the FAA," then that provision would have been enforceable as well. No party argues to the contrary.[1]

Section 9 of the 2007 customer agreement is not, however, as explicit as either of those hypothetical examples. The question before us, then, is how to interpret section 9's choice of law concerning enforceability of the class action waiver. Where section 9 requires us to consider whether "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable," does it mean "the law of your state to the extent it is not preempted by the FAA," or "the law of your state without considering the preemptive effect, if any, of the FAA"? Plaintiffs argue that it means the latter, and we agree.

Plaintiffs' principal argument in favor of their interpretation is that "under well established principles of contract interpretation, when a general

---

[1] We note that *Concepcion* did not hold that the FAA prohibits class arbitration. Rather, the case held that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*Concepcion, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1751].) Parties thus remain free to agree to class arbitration, even under the FAA as interpreted by *Concepcion*. But if the FAA does not prohibit parties from agreeing to class arbitration itself, then the FAA presumably does not prohibit them from agreeing that their agreement will be governed by state laws that are less hostile to class arbitration than the FAA.

and a particular provision are inconsistent, the particular and specific provision is para[]mount to the general provision." (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235.) On that basis, plaintiffs contend that the reference to "the law of your state" in section 9 of the 2007 customer agreement operates as "a specific *exception* to the arbitration agreement's *general* adoption of the FAA" in section 10. That is, although the agreement provides that in general section 9 is governed by the FAA, section 9 itself provides that the specific issue of the enforceability of the class action waiver shall be governed by "the law of your state."

DIRECTV's sole response to that argument is that "the contract interpretation principle [p]laintiffs invoke applies only where 'the provisions in question are truly inconsistent,'" but "there is no inconsistency" here because "both federal *and* state law have a role." (Internal quotation marks omitted.) We are not persuaded. If we apply state law alone (for example, the antiwaiver provision of the CLRA) to the class action waiver, then the waiver is unenforceable. If we apply federal law, then the class action waiver is enforceable and any state law to the contrary is preempted. That is a sufficient inconsistency to make plaintiffs' principle of contract interpretation applicable. Indeed, the entire preemption analysis of *Concepcion* is based on a conflict or inconsistency between the *Discover Bank* rule and the FAA. (See *Concepcion, supra,* 563 U.S. at p. __ [131 S.Ct. at p. 1751] ["class arbitration, to the extent it is manufactured by *Discover Bank* ... is inconsistent with the FAA"]; *id.* at pp. 1749-1750 ["the FAA was designed to promote arbitration," and "California's *Discover Bank* rule ... interferes with

arbitration"]; *id.* at p. 1753 ["California's *Discover Bank* rule is preempted by the FAA" because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotation marks omitted)].)[2]

Our interpretation of the contract finds further support in "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 62.) DIRECTV

---

[2] We also note that another provision of section 9 of the 2007 customer agreement appears to reflect the parties' intention to opt out of the FAA in certain respects, notwithstanding section 10's general statement that section 9 is governed by the FAA. Section 9 provides that "the arbitrator has no authority to make errors of law, and any award may be challenged if the arbitrator does so." The effect of such a provision is to authorize judicial review of arbitration awards for errors of law. But in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, the United States Supreme Court held that FAA procedures do not allow judicial review for errors of law, and parties cannot by agreement expand the scope of review under those procedures; the Court expressly declined to hold, however, that the FAA bars state laws from allowing for broader review. (See *id.* at pp. 586-590; see also *Concepcion, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1752] ["parties may not contractually expand the grounds or nature of judicial review' under the FAA].) (Under California law, broader judicial review is available by agreement of the parties. (*Cable Connection, supra*, 44 Cal.4th at pp. 1339-1340.)) The United States Supreme Court did not decide that issue until 2008, however, so its bearing on the 2007 customer agreement is not entirely clear. But the record reflects that DIRECTV's 2009 customer agreement contains the same authorization of judicial review for errors of law, which evidences DIRECTV's intention to opt out of the FAA in at least that respect even though the arbitration provision is in general governed by the FAA.

"drafted an ambiguous document, and [it] cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *(Id.* at p. 63.) Moreover, "[t]hat rationale is well suited to the facts of this case" because "[a]s a practical matter, it seems unlikely that" plaintiffs anticipated in 2007 that the Supreme Court would hold in 2011 that the FAA preempts the *Discover Bank* rule concerning the enforceability of class action waivers in arbitration agreements. *(Ibid.)* "In the face of such doubt, we are unwilling to impute this intent to [plaintiffs]." *(Ibid.)*

Finally, DIRECTV cites three cases as having "rejected" plaintiffs' argument. Two of the cases are readily distinguishable because, unlike the instant case, neither of them involves an arbitration agreement that specifically provides that the enforceability of the class action waiver is to be decided under state law. (See *Litman* v. *Cellco Partnership* (3d Cir. 2011) 655 F.3d 225, 231, fn. 8 [the agreement provided that state law applied "[e]xcept to the extent we've agreed otherwise in the provision[] on ... arbitration," the arbitration provision stated that it was governed by the FAA, and the class action waiver stated that "if for some reason the prohibition on class arbitrations ... is deemed unenforceable, then the agreement to arbitrate will not apply"]; *Meyer v. T-Mobile USA, Inc.* (N.D.Cal. 2011) 836 F.Supp.2d 994, 1001 [the agreement's only choice of law provision stated: "This Agreement is governed by the Federal Arbitration Act, applicable federal law, and the laws of the state in which your billing address in our records is located"].)

The third case, however, is a decision in the federal multidistrict litigation that parallels the instant state court actions. In an "[i]ndicative [r]uling" under rule 62.1 of the Federal Rules of Civil Procedure, the federal district court stated that the reference to "the law of your state" in section 9 of the customer agreement could not mean that enforceability of the class action waiver should be determined exclusively under state law, because that would render "meaningless" section 10's general statement that the arbitration agreement is governed by the FAA. (*In re DIRECTV Early Cancellation Fee Marketing and Sales Practices Litigation* (C.D.Cal. 2011) 810 F.Supp.2d 1060, 1071.) We disagree. The specific reference to state law concerning the enforceability of the class action waiver creates a narrow and specific exception to the general provision that the arbitration agreement will be governed by the FAA. It does not render that general provision meaningless. In addition, the district court's analysis does not address the principles that a specific provision controls over a general one and that ambiguous language is construed against the interest of the drafter. For all of these reasons, we decline to follow the district court's decision.

After briefing in this appeal was completed, the United States Court of Appeals for the Ninth Circuit decided a similar case concerning the enforceability of the arbitration provision and class action waiver in DIRECTV's customer agreement under *Concepcion*. (See *Murphy v. DIRECTV, Inc.* (9th Cir. 2013) 724 F.3d 1218 (*Murphy*).) The court held that "the arbitration agreement is enforceable under *Concepcion*," which preempts any state law to the

contrary.(*Id.* at p. 1228.) The court reasoned that "the parties' various contract interpretation arguments"—which included both the argument that the specific reference to state law controlled over the general reference to the FAA and the argument that ambiguities should be construed against the drafter—"are largely irrelevant to our analysis," because under the Supremacy Clause of the United States Constitution, and the related doctrine of federal preemption, federal law *is* the law of every state. (*Ibid.*; see also *id.* at p. 1226 ["Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, *is* the law of California and of every other state"]; see generally *id.* at pp. 1225-1228.)

We find the analysis in *Murphy* unpersuasive. On the one hand, insofar as the court's reasoning is a matter of contract interpretation, it means that when the parties used the phrase "the law of your state," they meant "federal law plus (nonfederal) state law." *Murphy* provides no basis for concluding that the parties intended to use the phrase "the law of your state" in such a way, and we are aware of none. On the contrary, a reasonable reader of the customer agreement would naturally interpret the phrase "the law of your state" as referring to (nonfederal) state law, and any ambiguity should be construed against the drafter.[3] On the other hand, insofar as the court reasoned that contract interpretation is irrelevant

---

[3] We here insert the parenthetical qualification "nonfederal" only to avoid confusion because *Murphy* states that federal law is state law. (*Murphy, supra*, 724 F.3d at p. 1226.) Elsewhere in this opinion, when we have referred to state law, we likewise meant nonfederal state law.

because the parties are powerless to opt out of the FAA by contract, we are aware of no authority for the court's position. Rather, as we have already observed, if the customer agreement expressly provided that the enforceability of the class action waiver "shall be determined under the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA," then that choice of law would be enforceable; *Murphy* cites no authority to the contrary.[4] Consequently, the dispositive issue is

---

[4] For example, *Murphy* cites a Third Circuit case for the proposition that, because of the Supremacy Clause, "choice-of-law doctrines (and, accordingly, attempts by contracting parties to influence their application with choice-of-law clauses) have no applicability to answering" the question of whether federal law or (nonfederal) state law supplies the rule of decision. (*Roadway Package System, Inc. v. Kayser* (3d Cir. 2001) 257 F.3d 287, 293-294, abrogated on other grounds in *Hall Street Associates, L.L.C. v. Mattel, Inc., supra*, 552 U.S. at p. 576; see *Murphy, supra*, 724 F.3d at p. 1228.) But that Third Circuit case actually held that, *pursuant to the FAA itself*, parties *are* generally free to "'specify by contract the rules under which ... arbitration will be conducted,'" even if the parties choose (nonfederal) state law rules that are inconsistent with the federal rules that would otherwise be applicable. (*Roadway Package System, Inc. v. Kayser, supra*, 257 F.3d at p. 294, quoting *Volt, supra*, 489 U.S. at p. 479.) That is the rule on which we rely, and which the Third Circuit recently reaffirmed in *Ario, supra*, 618 F.3d at p. 288. Similarly, *Murphy* relies on the dissenting opinion in *Volt* (see *Murphy, supra*, 724 F.3d at p. 1227), but that opinion too expressly agreed that parties may choose "state arbitration rules" instead of federal ones. (*Volt, supra*, 489 U.S. at p. 481, fn. 4 (Brennan, J., dissenting) ["I do not disagree with the Court's holding ... that the FAA does not pre[]empt state arbitration rules, even as applied to contracts involving interstate commerce, when the parties have agreed to arbitrate by those rules to the exclusion of federal arbitration law"].)

whether the parties intended to make that choice. As a result, "the parties' various contract interpretation arguments" are not "largely irrelevant." (*Murphy, supra*, 724 F.3d at p. 1228.)

To summarize: Section 9 of the 2007 customer agreement provides that "if ... the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." The class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable. The superior court therefore properly denied the motion to compel arbitration.[5]

DISPOSITION

The order is affirmed. Respondents shall recover their costs of appeal.

CERTIFIED FOR PUBLICATION.

ROTHSCHILD, Acting P. J.

---

[5] DIRECTV argues that if the class action waiver is unenforceable as to plaintiffs' CLRA claims, then, at most, the arbitration agreement would be unenforceable as to those claims, and the motion to compel arbitration should have been granted as to the remainder of plaintiffs' claims. We disagree. The language of the relevant provision of section 9 is broad, stating that "this entire Section 9 is unenforceable" if the class action waiver is unenforceable. Nothing in the language of the agreement suggests that the parties intended that if some class claims had to be litigated in court, then the parties would still arbitrate any claims as to which the class action waiver was enforecable. On the contrary, the language of the agreement indicates that if the class action waiver is unenforceable, then the parties are not interested in arbitrating at all. Again, insofar as the language of the agreement is ambiguous, we must construe it against the drafter. (*Mastrobuono v. Shearson Lehman Hutton, Inc., supra*, 514 U.S. at pp. 62-63.)

We concur:

CHANEY, J.

MILLER, J.*

Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Superior Court of California, County of Los Angeles

DATE: 01/26/12			DEPT. 311
HONORABLE JOHN SHEPARD WILEY JR	JUDGE	M. MATA	DEPUTY CLERK
		ELECTRONIC RECORDING MONITOR	
HONORABLE #1	JUDGE PRO TEM		
T. BIVINS, CA	Deputy Sheriff	L. COMSTOCK (CSR 3741)	Reporter

8:30 am	BC398295 AMY IBURGIA ET AL VS DIRECTV INC 170.6 CCP AGAINST JUDGE LICHTMA C/W BC398431 DEEMED COMPLEX (09-29-08)	Plaintiff Counsel	PAUL D. STEVENS (X) SHIREEN MOHSENZADEGAN (X) EDIE MERMELSTEIN (X) MARK MILSTEIN (X)
		Defendant Counsel	ROBYN E. BLADOW (X) SHAUN PAISLEY (X) MELISSA D. INGALLS (X)

NATURE OF PROCEEDINGS:

MOTION TO DISMISS/STAY;

MOTION TO COMPEL ARBITRATION;

Matters are called for hearing.

Counsel have read a copy of the Court's tentative ruling, given to counsel before the hearing.

Matters are argued. The Court's tentative ruling stands as follows:

Motion denied because Brown controls.

Plaintiffs Amy Imburgia and Kathy Greiner initiated this class action against Defendant DirecTV. Inc. For convenience, the court refers to both Plaintiffs as "Imburgia." Imburgia contends DirecTV unlawfully charged early cancellation fees to customers who terminated DirecTV's service

before their contracts expired. The court certified a class of "[a]11 California DirecTV customers who were charged by and/or paid to [DirecTV] an [early cancellation fee] from September 17, 2004 to the present."

The service contract DirecTV sends its customers contains an arbitration clause. At the time Imburgia filed the complaint in this case, Discover Bank was controlling authority. In Discover Bank, the California Supreme Court invalidated consumer arbitration agreements with class action waivers. (Discover Bank v. Superior Court (2005) 36 Cal.4th 148, 162-163.) The arbitration agreement in DirecTV's service contract contains a class action waiver. DirecTV did not move to compel arbitration when it responded to Imburgia's complaint, because its arbitration agreement was invalid under Discover Bank. Then, on April 27, 2011, the United States Supreme Court invalidated Discover Bank. In AT&T Mobility, the court held agreements to arbitrate cannot be invalidated by defenses that derive their meaning from the fact that an agreement to arbitrate is at issue. (AT&T Mobility LLC v. Concepcion (2011) 131 S.Ct. 1740, 1742-1743.)

Based on AT&T Mobility, DirecTV moves to compel arbitration. The motion is denied. Imburgia argues the arbitration agreement is unconscionable because it waives the statutory right to bring classwide arbitration or a class action lawsuit under the Consumers Legal Remedies Act ("CLRA"). Civil Code section 1781 provides, "[a]ny consumer entitled to bring an action under [the CLRA] may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an

action on behalf of himself and such other consumers to recover damages or obtain other relief." (Civ. Code, § 1781, subd. (a).) Under state law, the provisions of the CLRA are nonwaivable. (Civ. Code, § 1751.)

In the Brown case, California Court of Appeal noted the AT&T Mobility decision did not reach the issue of whether the Federal Arbitration Act preempts California law on waivers of statutory representative actions. (Brown v. Ralphs Grocery Co. (2011) 197 Cal.App.4th 489, 502.) Thus, the court held a waiver of the right to bring a representative action under the Private Attorney General Act of 2004 ("PAGA") is unenforceable, notwithstanding the holding of AT&T Mobility. (Ibid.)

In so holding, the Brown court noted, "The purpose of the PAGA is not to recover damages or restitution, but to create a means of "deputizing" citizens as private attorneys general to enforce the Labor Code. [Citations] Here, the relief is in large part 'for the benefit of the general public rather than the party bringing the action' [Citation], just as the claims for public injunctive relief [under the Unfair Competition Law and CLRA] in Broughton and Cruz...." (Id. at p. 501; see Cruz v. PacifiCare Health Systems, Inc. (2003) 30 Cal.4th 303, 307 [applying CRLA], id. at p. 312 ["requests for injunctive relief designed to benefit the public presented a narrow exception to the rule that the FAA requires state courts to honor arbitration agreements"].)

Thus, the Brown court recognized claims under PAGA are analogous to claims under the CLRA. The holding in Brown is therefore not limited to PAGA

claims, but applies, by its logic, to waivers of any statutory representative actions.

The court cannot enforce the waiver of Imburgia's right to bring a classwide action under the CLRA. The arbitration agreement states, "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable." Thus, the arbitration agreement is unenforceable.

Motion to Decertify is denied.

Status Conference is set for March 5, 2012 at 8:30 a.m. in this department.

Counsel are to file a joint status report by February 24, 2012.

Notice is waived.